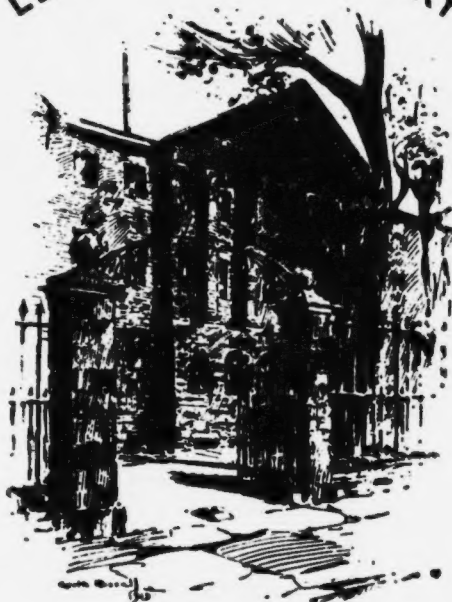


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PROVINCE HOUSE

JUDGMENT

Delivered on the 14th December, 1862, by

HIS HONOR THE MASTER OF THE ROLL

IN THE CAUSE OF

JAMES MELVIN, Complainant,

AND

REEMAN TUPPER, and others, Trustees under the Will of }
James Graham, late of Liverpool, N.S., deceased. } Defendants

Compt., The Hon. Jas. W. Johnston.
Despts., William Young, Esq.

Solicitor for the Complt., Charles Twining, Esq.
Solicitor for the Defdts., George R. Young, Esq.

This case was argued before me on the 9th, 10th, and 11th of November last, by Mr. W. Johnston for the Complainant, and Mr. William Young for the Defendants.

I have carefully considered it and am now to pronounce the decree of the Court.

The Complainant filed his bill on the 19th of September, 1850. The material facts, as I collect them from the evidence, are as follows :

James Goreham, who died in 1841, by his last will and testament, made the following devise:

“ And whereas it is my earnest desire to sustain and perpetuate the Church in the town of Liverpool, of which myself and Mrs. Goreham are members, usually designated as the Liverpool Congregational Church, and to preserve in their purity the doctrines, ordinances, and discipline, now recognized by its members, especially in reference to the ordinance of baptism, as at present administered to all subjects, as well as adults; and moreover to contribute to the repairs of the Church, and to the support and maintenance of the Rev. Mr. Melvin, the present officiating minister and his successors in office. I do, therefore, for these purposes, give, devise, and bequeath, unto Freeman Tupper, Nelson Freeman, Joseph Payzant, Fady Phillips, and Henry Payzant, and the survivors of them, and to their successors, to be appointed as hereinafter mentioned, all that certain lot, tract, piece, and parcel of land, now occupied by the said Reverend Mr. Melvin, bounded northwardly by the lane leading to the property of Mr. Henry Payzant, westwardly by the road leading from the main road to Ship Yard Point, southwardly by a line commencing ten feet from the southwardly corner of the dwelling house erected thereon and extending thence to the rear line of said lot, and thence by the fence as it now stands; also, all that certain other lot lately purchased by me, whereon the old jail stood, now occupied by a dwelling house, bounded

southern line of last described premises, westwardly by the road leading to the Ship Yard Point, southwardly by the main street, and eastwardly as the fence now runs, with all the buildings and appurtenances. To Have and To Hold the said described lots unto the said Freeman Tupper, Nelson Freeman, Joseph Payzant, Fady Phillips, and Henry Payzant, and the survivors of them, and their successors in office. In trust nevertheless, that they my said trustees do and shall suffer and permit the said Reverend Mr. Melvin, during the time and while he shall continue the Minister of the said Church, to occupy, possess, and enjoy, the last described premises, and from and immediately after his decease and other termination of his ministerial connection with the said Church, to permit and suffer such other person as shall be elected and chosen, as hereinafter mentioned, to officiate as his successor in such ministry, to have the like possession, use, occupation, and enjoyment thereof, and so with all future successors, as a vacancy by death or otherwise shall arise, and upon this further trust that my said trustees do, from time to time, lease, for the highest rent that can be obtained for the same, all and singular the premises first above described and now in the occupation of the Rev. Mr. Melvin, and the rents arising therefrom to apply from time to time, as far as it may be necessary, for and towards the repairs of the said property. But it is my desire, and I do hereby direct, that in case of the death of the said Reverend Mr. Melvin leaving his wife surviving, my said trustees do and shall suffer and permit his widow to occupy and enjoy said premises, directed to be leased as aforesaid, free of rent, so long as she shall continue unmarried. I do further give, devise, and bequeath, unto the said Freeman Tupper, Nelson Freeman, Joseph Payzant, Fady Phillips, and Henry Payzant, and their successors in office, as aforesaid, the sum of seven hundred pounds. In trust nevertheless, that they my said trustees, and their successors, do and shall, and lawfully may, the same premises

call on the same and reinvest it, and the interest arising therefrom to pay and apply as follows: a sum not exceeding twelve pounds in and of, and for keeping up the repairs of the meeting house and the dwelling house and premises, to be occupied as aforesaid, by the Rev. Mr. Melvin, as before mentioned, and his successors for the time being in the ministry of the said Church, and the residue together with such rent as may from time to time remain after the necessary repairs, upon the property now occupied by the Reverend James Melvin, for and towards the support and maintenance of the Reverend Mr. Melvin, so long as he shall continue such Minister of the Congregational Church, and his successors in said office for the time being. It is my further will and desire, that the foregoing provisions shall extend to any other Congregational Church which may be erected in Liverpool by the members thereof, in case the present building be destroyed by fire, or other accident; and further more, this Trust is upon condition that whenever it shall be necessary to make choice of, or displace the Minister for such congregation, that the same be done by a majority of the members of the Church, and of such persons as shall have contributed for at least one year previous to such acts, for and towards the maintenance and support of the Minister, and have usually attended his public services for the same period. And I do hereby further order and direct, that when and so soon as either of my said trustees named for and behalf of the Temperance Hall, and for and behalf of the Congregational Church, respectively, shall happen to die, then the survivors, or the majority of them, do and shall forthwith nominate and appoint a successor to fill up such vacancy, in whom together with such survivors shall vest all the powers and authority appertaining to such trusts hereinbefore mentioned and expressed, and so from time to time as often as a vacancy shall arise, and for this purpose that a record shall be kept and preserved of all their proceedings touching the execution of said Trusts, and the appointments to fill such vacancies."

He subsequently added to it the following codicil:

I give the sum of four thousand pounds payable after the death of my wife to the Trustees, and for the uses hereinafter named, that is to say to the Chief Justice of the Province of Nova Scotia, and his successors in office, and to the Treasurer of said Province, and his successors in office, and to the Reverend James Melvin, while Minister of the Congregational Church at Liverpool, and his successors in the said office, and to William Sterns, William B. Taylor, Freeman Tupper, Esquires, and Mr. Nelson Freeman, and in case of the permanent absence, and of the death of either or any of the said last named four persons, then to the surviving and continuing trustee, and such person or persons as they or a majority of them shall from time to time nominate and appoint to supply any such vacancy or vacancies, in trust and to and for the uses and purposes following that is to say. To keep the said sum of four thousand pounds

securely invested upon interest to the the best advantage, and the interest dividends and produce thereof to pay and apply as follows, that is to say:

The sum of sixty pounds to the said named James Melvin while he remains Minister of the Congregational Church at Liverpool, and in case he should be incapacitated by age or ill health from preaching, eighty pounds annually and in the last mentioned case Eighty pounds annually to an assistant Minister of the said Church, so as such assistant shall be a preacher of the doctrines of the said Congregational Church, and shall conform to the articles and covenants of the same Church as now Established at Liverpool and after the said Mr. Melvin shall cease to be such Minister as aforesaid by death or otherwise then one hundred and twenty pounds annually to such Minister and Ministers as may from time to time be chosen by the members of the said Church, and shall faithfully serve in such office being preacher of the Doctrines of the said Congregational Church as at present held, and conforming to the articles and covenants thereof as now established. A further sum of twenty pounds for the support of a Sunday School in connection with the said Church, to be paid to the Minister, and such persons as shall be named by the said Church or a majority of them, and to be paid and expended annually in the purchase of books and tracts for the use of the said School.

And twenty-five pounds annually to the British and Foreign Bible Society in London, upon condition that one half the amount remitted shall annually be returned in Bibles and Testaments to the Queen's County Auxiliary Bible Society, for distribution by that Society.

And twenty-five pounds annually to Mrs. Ann Melvin, after the death of her husband, the said Rev. James Melvin, in case she shall survive him, during her widowhood.

And also, as much as may be required for keeping continually insured against fire and other accidents usually insured against, eight hundred pounds on the meeting house and four hundred pounds on the Minister's house of the said Congregational Church at Liverpool, and as may be required for keeping those buildings in repair.

And all or any the residue and remainder of the said interest, dividends, and produce of the said four thousand pounds, for and towards the educating one or more young men, from time to time, for the ministry in the said Congregational Church at Liverpool. It is my intention that these several annual provisions foregoing, shall be in addition to whatsoever may be given in my will, for the same or the like objects or uses."

This James Melvin is the Compl. At the instance of the Testator, he removed in 1836, to Liverpool, and took the pastoral charge of the Congregational Church there; which charge then and since has comprised persons holding Congregational principles, residing at Liverpool, Milton, Beach Meadows, and Herring Cove. Its Deacons were

chosen by the Church members residing at these places, and in the year 1847 James Clements of Liverpool, Geo. McLeod of Herring Cove, Wm. R. Freeman of Milton, and Samuel Kinney, were the Deacons.

The management of the affairs of the Church belong exclusively to the male communicants, who are called members of the Church. Of this Church, from the time he assumed the charge of it, until the end of the year 1846, the Complainant continued to be the Pastor; respected by his people; diligent in his office; of irreproachable character; the father of a large family of fourteen children; the husband of an affectionate wife; the Mrs. Melvin mentioned by the Testator. How his pastoral relation to this Church was contracted, how long it was to continue, or in what manner, or by whom it might be dissolved, is not proved. No verbal or written contract was entered into with him at any time during the above period, nor does it very distinctly appear in what manner his income was raised; but I gather from the evidence that it was by the voluntary contributions of the members of the Church and congregation annually subscribed.

To the yearly amount of those subscriptions, after Goreham's death, the interest on the £700 (less that portion of it required for the repairs of the meeting house and Minister's house in Liverpool), was probably added.

Goreham's devise, whether intended primarily for the Church, or primarily for the Complainant, operating in fact as a diminution the of yearly contributions. The Defendants are the Trustees under the devise of the £700, and they paid the annual produce of it, (less the amount required for the repairs above mentioned), to the Complainant, until the end of the year 1847. Since then they have withheld it from him, alleging that he has ceased to have interest therein. To enforce the payment of it is one of the principal objects of this suit.

The prayer of the bill is as follows:

"That your orator may, by the decree of this Court, be declared the Pastor of the said Congregational Church, and as such Pastor entitled to all the rights, privileges, and immunities thereof, and also, to all the benefits designed for said Pastor by the said will of the said James Gorham.

And that an account may be taken of the arrears of the said annuity, since the last payment thereof to your orator; and also, an account of the monies expended by the said Trustees, or any of them, in or about the repairs of the said Congregational Meeting House at Liverpool; and also, the said dwelling house; and also, what sum remains to

be expended thereon, in the hands of the Trustees.

And that the said sum of seven hundred pounds may be decreed to be invested by the said Trustees, upon some permanent and safe security.

And that the said Defendants may be decreed to pay to your orator the arrears that may, upon such account being taken, be found to be due to your orator; and also, the same, from time to time, as it shall hereafter become due and payable.

And that such directions may be given, as regards the investment of the said sum of seven hundred pounds, under the order of this Court, as will ensure the punctual payment of the said annuity to your orator, and his successor in office hereafter.

And that the said Defendants may be decreed to pay to your orator all the costs sustained by him in the premises and incurred in this suit, by reason of the default of the said Defendants.

And that your orator may have such other and further relief, in the premises to which he may be deemed entitled, to the same extent as if particularly prayed for, as to your Excellency shall seem meet and agreeable to equity and shall be good conscience."

It appears that the Complainant was a widower in the early part of 1847, for in that year he married his present wife, who is the sister of Freeman Tupper, the sister-in-law of Henry Payzant, and the mother of Jacob Whitman, three of the Defendants; none of whom are members of the Church.

In the year 1847, (it is not distinctly stated when, but I think it must have been about July) the Complainant left Liverpool on a missionary tour, from which he did not return until Saturday the 9th of October. During his absence, his wife originated and propagated reports injurious to his moral character.

What the charge made by her was, is not specified, but it must have been that of incontinence. During his absence, also, other rumors were in circulation. Some of the witnesses say that they had been in circulation before he left on his tour, but that none, such were in existence before the end of the year 1846, is clear. These rumors related principally to his being deficient in discipline and unsound in doctrine. It was said that his teaching leaned towards Universalism and that he had circulated Universalist tracts.

During his absence, circumstances occurred which resulted in a meeting of a number of members of the church, immediately after his return; and, as these circumstances have an important bearing upon the case, I will examine them at large,

About twelve months before this period

the Rev. James Gallaway a minister of the congregationalist union of England and Wales had visited Liverpool, and Preached in the Congregationalist Meeting House there. He again came to Liverpool in the month of September and left it before the defendant's return. While there three of the four deacons, viz. James Clements, George McLeod, and William H. Freeman applied to him for advice as to difficulties, which they represented to be existing in the church in relation to the complainant, and a meeting was arranged between him and the deacons which occurred shortly afterwards.

It was there determined that if possible the complainant should be induced to tender his resignation; and with this view the Rev. Mr. Gallaway was requested to address a letter to him. A day or two afterwards he prepared one accordingly, which I will now read.

LIVERPOOL, Sept. 26th, 1847.

Dear Brother,—Having been in Liverpool during the last two weeks, you will naturally suppose that I have heard many rumours and opinions respecting your position here, and the matter of your continuance in this sphere of Christian labor. In compliance with the wish of the Deacons, I have met with them to advise them what course to take.

The *unanimous* opinion of the Deacons is, that it will be best for all parties, yourself, your family, the Church and Congregation at Liverpool, for you to relinquish your present connexion with the people here. In this opinion, from all that has been told me, I concur.

At the same time this opinion is not founded on the *truth* of the rumours which have been circulated respecting you. The Deacons do not credit them, I do not credit them, nor does the Church credit them. I believe there is strong sympathy in your favour; and yet it is a *general*, perhaps *unanimous*, opinion, that your usefulness is done at Liverpool; and that it will be better for you, as well as for them, *for you to RESIGN*.

I believe that if you were to tender your resignation it would be accepted, and you would receive an honorable testimonial, signed by the Church generally.

On receiving such a testimonial, your brethren in the Province would exert themselves to secure another and an eligible sphere of labor for you. In New Brunswick there is a Church which is in want of a Pastor. There is a Minister's house attached to the Chapel, and the people have engaged to raise eighty pounds per annum. The Union will be able to add something to this amount.

My dear Brother, I deeply sympathise with you, I am convinced that you are an injured man. All attempts however, to brave the oppo-

sition that is raised against you here, would have an injurious effect. In all respects, *now* you have sympathy in your favour, *now* you can get an honorable testimonial, and hence you may live to be useful, respected, and happy, in another sphere of labor.

Yours affectionately,

(Signed) J. C. GALLAWAY.

This he handed *open* to George McLeod, who read it as did also W. H. Freeman, and it was by him *sealed* and given to James Clements to be presented to Complainant. James Clements did so, and became only aware of its contents, from the Complainant's mentioning them to him on the day he delivered it to him.

At or about the same time that Mr. Gallaway prepared it at the request of George McLeod and W. H. Freeman, he prepared (and handed to George McLeod, who gave it to W. H. Freeman) a draft of a resolution to be moved the purport of which was that the Church should get another pastor. When the request to prepare this resolution was made, neither James Clements nor Samuel Kinney was present, nor were they aware that it was intended that such a paper should be prepared.

It was then arranged by these Deacons that a Church meeting should be called immediately after Complainant's return, to investigate the reports against Complainant's moral character.

After this letter and resolution had been thus prepared, Messrs. Gallaway, Freeman, and McLeod, called on Mrs. Melvin; but what took place does not appear.

On the Saturday after the Complainant's return, viz.: 16th October, 1847, a Church meeting was held in the meeting house at Liverpool. The notice that it was to be held was given at a prayer meeting; none was published on the previous Sunday from the pulpit of the meeting house, nor was any notice sent to the members of the Church at Milton, Herring Cove, Beach Meadows, or to those members of the congregations that resided at those places.

Neither Mr. Gallaway nor the Deacons had any communication with the Complainant relative to those proceedings; nor did they or any of them, apprise him that the draft of the resolution had been prepared by Mr. Gallaway. Nor did they take any steps to ascertain the sentiments of the Church or congregation generally, before they were prepared. This meeting consisted of seventeen members only of the Church, and they

having assembled, sent to the Complainant's house and required the attendance of himself and wife. The latter came and withdrew the charge she had made, asserting, on the faith of her husband's assurance, her belief in his innocence.

The Complainant then appeared, stated that no person could charge him with anything improper, but added that his character was injured by the reports, and leaving with them a paper, of which this is a copy, withdrew:

LIVERPOOL, October 16th, 1847.

To the Officers and Members of the Congregational Church of Liverpool, N. S.

Dear Brethren in Christ, I do hereby, in the name and fear of the Lord, agreeably to the advice of the Deacons and the Rev. Mr. Gallaway, ask my dismission from this Church, and pray that the Lord may send you a pastor that may prove a blessing to this Church.

Your affectionate pastor,

(Signed) JAMES MELVIN.

The assemblage immediately and (with the exception of one) unanimously accepted this as a resignation of the Complainant's charge, and declared the pastoral relation between him and the church at an end. The resolution for this purpose was verbal, there was no record made of the proceedings, and none were reduced to writing. No specific charge was preferred, nor was any other business transacted at the meeting. The persons, of which it was composed, were church members, resident in and about Liverpool, and did not comprise those of the other districts.

Some time in the next month, (November) a larger meeting of the members of the Church and congregation took place, at which it was resolved, that the proceedings of the first meeting were illegal, and that the Complainant should remain Pastor as before.

I have not been able to ascertain accurately the numbers present at this meeting, nor is it important, as there must have been more than twice as many as those who first assembled, the majority for retaining Complainant being fourteen at least, and at this time there were between seventy and eighty male members of the Church and congregation, who contributed to his support.

One of the conditions on which he was to be retained, was that he should take back his wife, who was not then living with him. He did this, and she was living with him at the time of the next meeting, which took place February, 1848, and which, for the sake of

distinction, I shall call the council meeting.

No public notice was given of this November meeting, but information, that it was to be held, was given "by one person telling another."

From this period until February, 1848, the Complainant continued in the performance of his duties as usual.

In this month the meeting house in Liverpool was locked up, and thereafter until the time of filing his bill, he has in Liverpool preached in the Mission house there, in which he still continued to reside, and in the other stations as he had always before done.

Early in February and before the council meeting took place, the Rev. Mr. Tomkins, then Minister of the Congregational Church at Yarmouth, arrived at Liverpool, accompanied by James Hilton, one of the Deacons of that Church. Hilton gives this account of his own presence there:

"My visit was entirely accidental. I am not aware that Mr. Tomkins came here having any specific object in view. I think I staid in Liverpool four or five days. I was requested while there to attend a meeting of the Church. I attended it at the meeting house in Liverpool. The meeting was called for the purpose of adjusting difficulties between Complainant and Church at Liverpool. When I went to the meeting it was with the understanding that the Rev. Mr. Tomkins, Rev. Mr. Sterling, Deacon David Freeman, and myself, were to act as a council or arbitrators, to try to adjust the existing difficulties. I saw Complainant before the meeting was held. I cannot recollect what took place before. Complainant knew Council was to be held."

At the same time the Rev. Mr. Sterling, Congregational Minister at Pleasant River, appeared in Liverpool, with the David Freeman just named, who was a Deacon of the Pleasant River Church; and he says:

"I knew of the council before I came into Liverpool, but I did not know, until I got word, that Mr. Sterling received a letter to attend this council, the evening before we left home, and he showed me the letter."

Mr. Tomkins came to Liverpool uninvited. Wm. Freeman says: "No person, to my knowledge, sent for Mr. Tomkins to come to Liverpool; after he came he suggested that a council should be called." He goes on to say: "About this council I knew nothing until I had a conversation with Mr. Tomkins and Mr. Hilton. No person but myself recommended the council, Mr. Tomkins and I talked it over together, and Mr. Sterling and Mr. David Freeman were sent for by me, about two days before the meeting. No person but myself recommended the

council. I had no conversation about it with Complainant. Mr. Tomkins preached in Complainant's meeting house the Sunday afternoon previous to the meeting of the council."

At this time the Complainant was confined to his house by illness, and he did not attend the Council. On the Saturday before it assembled, Mr. Tomkins addressed the Complainant the following letter :

LIVERPOOL, Feb'y 5th, 1848.

My dear Brother,—I will preach for you on Sabbath afternoon and evening, if you will take the morning service. I would advise you to call a special Church meeting for Monday evening at 6 o'clock. I think you had better call it to take into consideration the best means of promoting the present and future welfare of the Church over which you preside, and for any other business that may be deemed of importance then. I would earnestly advise you to call this meeting yourself, rather than let the Church or Deacons, which we have advised them to do if you decline; it will come with a much better grace from you. I would intreat you to tender your resignation to that meeting. I shall be glad to render you any service in my power, now or at any future time. We will arrange that you shall have the testimonials of the Church and of us your brethren in the Gospel, so that you may proceed with a firm step into any other sphere of labor. I am convinced that you *must ultimately* resign, or else damage your character forever. Every hour the matter is becoming worse and worse; pray do not delay, trust the Lord, he will provide for you and bless you, if you depend upon him; we will, cheerfully, on Monday before the meeting, and at the meeting, and I think all may be settled for your mutual good.

I am sure I love you and esteem you very highly, for your works sake, and would advise you for your personal good; with these feelings, I unhesitatingly advise you, in a dignified manner, to resign your pastorate of the Church with which you now are connected. Pray, my dear brother, let no pecuniary consideration enter into your mind as a Christian Minister; these ought to be quite secondary.

God will open a door for you, and provide for you. To stay is ruin to yourself and to this Church.

With much affection, believe me, dear brother,

Yours very truly,

FREDK. TOMKINS.

REV. JAMES MELVIN.

Simultaneously with his writing this letter, he prepared a paper, of which the following is a copy :

LIVERPOOL, N. S., Feb'y 5, 1848.

We, the undersigned Deacons and Members of the Congregational Church in Liverpool, are of opinion that it will be for the welfare of the Church to hold a special Church meeting on

Monday next, the 7th instant, at six of the clock in the evening, to enquire into the best means to secure the present and future prosperity of the Church, and whatever business may be then found necessary to transact; also, to seek the advice of a council on that occasion in regard to the above objects.

It is signed by Samuel Kinney, W. H. Freeman, and George McLeod, Deacons, and also by Nelson McLeod and Joseph Freeman.

A document in the hand-writing of the Complainant, of which the following is a copy, is also in evidence :

Whereas a rumour has been circulated touching the moral character of the Rev. Mr. Melvin, our Pastor, the Church has investigated the matter of the report, and is fully satisfied of his innocence.

Signed in Behalf of
The Church,

Liverpool, Oct. 16th, 1847.

JOHN McLEOD, Clerk.

JONATHAN CROWELL, Asst. Clerk.

SAMUEL KINNEY, Deacon.

GEORGE McLEOD, Deacon.

JAMES CLEMENTS, Deacon.

WILLIAM H. FREEMAN, Deacon.

NATHAN TUPPER, Chairman.

On the evening of the 7th February, a meeting of members of the church took place at the meeting house at Liverpool, and it was agreed that Messrs Tomkins, Sterling, David Freeman, and Hilton, should retire and consider the affairs of the church; having done so, they returned with a report written by Mr. Tomkins, of which the following is a copy :

LIVERPOOL, N. S., Feb'y 7th, 1848.

To the Pastor, Deacons, and Members of the Congregational Church in Liverpool, Nova Scotia.

Dear Brethren in the Lord,—We have carefully taken into consideration the legality of the meeting of your Church, at which the Rev. James Melvin tendered his resignation as pastor, and we feel bound to state, in our judgment, that that meeting was a legal one in all respects. We deem it of great importance to pronounce upon the validity of this meeting, as it may affect the future interests of your Church.

In regard to our dear brother in the bonds of the Gospel, the Rev. James Melvin, your late Pastor, with whom we deeply sympathize, it is our very firm conviction that although we believe his usefulness is by no means entirely at an end, in this portion of the Lord's Vineyard, still we think there are other spheres of labor in which he may be much more extensively useful, than in that in which he is now engaged: that is to say, in which he may labor with much greater satisfaction, as far as regards himself; and in which

his efforts may be duly appreciated by the whole of his flock.

It is, also, our opinion, that it will be for the peace and prosperity of this Church to obtain another Pastor, firmly attached to your distinctive principles as Congregationalists, to preside over you in the Lord;—we urge you to adopt measures for this much to be desired end at once; to seek special direction from on high, and to endeavour to be perfectly unanimous in your selection.

We advise you by no means to be satisfied with a bare majority, as we feel convinced that much of your future prosperity and usefulness depends upon your acting with perfect unanimity in your choice of a Pastor.

We strongly urge upon you the duty of exhibiting a proper spirit of liberality, in regard to one who has served you long, and as we believe, to the utmost of his abilities; we would beg you to manifest this by making immediate donations and subscriptions for his present support, and by endeavouring in every way to sustain him, till the great head of the Church will direct your late Pastor to another sphere of usefulness.

We commend him and his children, with all their interests, to your Christian sympathies and regard.

In conclusion, we beg you to present to your late Minister the best testimonial in your power; to this he has a just claim. We urge you to do this in the most delicate and affectionate manner possible. We also wish to express our readiness to append our testimonials to yours when prepared.

(Signed)

GEORGE STIRLING, Pastor of the Church,
Pleasant River.

DAVID FREEMAN, Deacon of the above
Church.

FREDERICK TOMKINS, M.A., Pastor of the
Church in Yarmouth.

THOMAS HILTON, Deacon of the above
Church.

Subjoined to this report is a memorandum written also by Mr. Tomkins, and signed by himself, Sterling, and Hilton, of which a copy follows:

Council appointed by the Church, to give their opinion and advice.

Rev. Jas. Melvin, and the male members of the Church, thirty-one in number, then present, having unanimously agreed to their appointment.

It was agreed by the members present, with three dissentients, that the above advice be taken.

FREDK. TOMKINS.
GEORGE STIRLING,
THOMAS HILTON.

There is some contradiction between the Complainant's and Defendants' witnesses, as to what occurred when this report was announced to the meeting, and also, as to what took place before Mr. Tomkins and the others retired; but it sufficiently appears

that the report was assented to by all at the meeting, except three, there being present about thirty.

Nathan Tupper and the Defendants' witnesses say, "that this was a full meeting, but that the congregation was not at the council, it was merely a meeting of a great portion of church members from around Liverpool, and from Herring Cove."

No public notice was given from the pulpit or otherwise, in the meeting house on Sunday; nor was any notice given to the other portions of the church or congregation in the circumjacent settlements. The notice actually given of it was "by one person telling another."

A paper in the Complainant's hand-writing, without date, has been proved, and is as follows:

To the Church and Congregation over which I have presided for many years.

Dear Brethren,—If it be the opinion of the majority of this Church, that my usefulness is done in the sphere of my labor, in the several preaching stations which I now fill, and that they think it advisable for me to go far hence, I submit to their decision. But if they wish me to stop and minister to them as usual, I should be happy so to do; and as we have often been blessed and profited together, I doubt not that we should be again; for the wrongs you have seen in me, dear brethren, during my twelve year ministry among you, I ask your forgiveness, and I hereby freely forgive those which I have seen in my brethren.

Nevertheless, I do not wish to stand in the way of another Pastor, or in any wise oppose those who cannot be profited under my ministry. I should be happy to see the Church agree to get another Minister, and as I said before, give to such any preference which he, as a Christian Minister, would accept.

Such a course, I think, would produce a Christian feeling among the brethren, and have a tendency to build up and strengthen the Church. I would not wish my brethren to think that I wish to stop, in opposition to a party; no, far be it from me. I have many ties to bind me to this Church and place. Where am I to find a shelter for my family, not in this Province? but I submit to the counsel of my brethren and the providence of God.

Another paper, also in Complainant's hand-writing, and dated 5th March, 1848, has been proved by the Defendants, and is as follows:

This certificate that the bearer of this, the Rev. James Melvin, has presided as Pastor over the Congregational Church in this place, during the last twelve years and has faithfully and affectionately preached the Gospel of Jesus Christ; and has been the honoured instrument in the hands of the great head of the Church of the conversion

of many souls to God, and of comforting and building up the Saints in their most holy faith, and has maintained a good moral and religious character, which has secured to him the respect of all classes of the community.

Signed in behalf of the Church.
Liverpool, N. S., March 8, 1848.

Shortly after this, Freeman Tupper, one of the Defendants, demanded the key of the meeting house from the Complainant, who gave it to him. Tupper locked it up, and since then the Complainant has not been allowed to preach in it.

It does not appear who has the right to the possession of this house, but Freeman Tupper is one of the trustees thereof, having, as he swears, become one on the resignation of the late John Barss. It would also seem that a person named Edward McLeod is a trustee. Crossland, one of the Complainant's witnesses, stating as follows :

"I remember when Complainant's meeting house was locked up, it was in the summer of 1848. I was going from it to my own house, I saw Edward McLeod of Herring Cove, and some Herring Cove people with him, by the vestry door. The door was locked, they could not get in. He said he was a trustee of the meeting house, and he should like to know who would lock the door against him ; he had an axe in his hand, and would have broken it open, but for the Compl't.'s coming over from his house, and preventing him from doing so."

Except Freeman Tupper, none of the Defendants appear to be trustees of the meeting house. Other meetings of portions of the Church and congregation, (one of which was held in the Mission house at Liverpool, and another at Herring Cove) took place. Both of them were of friends of the Complainant. They were held after the council meeting, and after the door was locked. Their numbers and what occurred at them show that a large portion of the Church and congregation still adhered to the Complainant, and regarded him as their Pastor.

Clements states that, at the time "the meeting house was locked up, there were, he believes, seventy or eighty male members of the Church and congregation, contributing to his support ; and names among them as many as eleven pewholders and pew owners ; he states that at the time, about thirty male members of Complainant's Church and congregation attended his ministry. At the time of the meeting, November, 1847, about forty or fifty male members of Complainant's congregation resided at Beach Meadows and

Herring Cove ; and that he believes all of them contributed and still contribute to his support.

It appears moreover that none of the Beach Meadows people have left Complainant's ministry.

Various acts of acquiescence of the Complainant, besides preparing and receiving the certificate of character, dated 16th October, 1847, and those I have stated, are in proof, as that he promised to deliver up the Church books to Freeman Tupper, when he handed him the key. There are, also, in proof, declarations of his assent to what was done by it. His declarations may be distributed into three periods, viz., those made after the meeting in October, 1847 ; after the November meeting and before the council ; and subsequently to the latter. Thus he told Fady Phillips shortly after the October meeting, that he had taken his dismission from the Church, and more to the like effect.

Again, after the meeting in November, he desired Phillips to give him what was due to him, as he wanted to go away, for that if he stopped he would do no good. On the next day, however, he had altered his mind and said he was going to take back his wife.

So after the council meeting he called on John McLeod, to give him the testimonials recommended by the council, and said if he had had them he would have been far away ; and then at McLeod's request, he sketched the form of the certificate he desired, and which, it may be presumed, is the paper dated 8th March, 1848, which I have just read. Whether this certificate was signed and returned to Complainant, does not appear in evidence. Nelson McLeod, one of the Defendants' witnesses, says the decision of the council "was that they were to give the Complainant testimonials ; these were afterwards brought to me to sign, I did not sign them because I believed he was not worthy of them."

These are the principal declarations of the Complainant.

The Complainant has constantly retained possession of the Mission house ; and he and his supporters have used it for ministerial purposes, notwithstanding, as I have already noticed, he has been required to give it up.

As to the meeting of the 16th October, 1847, W. H. Freeman says, "that after the resignation of Melvin was accepted, the Church was without a Pastor." As to the council, he says, "that it was rather a full

meeting." He also says, that "the whole subject of the two previous meetings and difficulties pending were gone into, and fully discussed; that both parties had an opportunity of stating to the council whatever they wished; that the decision of the meeting, to abide by the decision of the council, was carried by a large majority, only three voting against it; and that at the council meeting he should think a large majority of the male members were present." As regards the mode in which proceedings were conducted at the council meeting, he says, "there were charges made against the Complainant, by which he means fault-finding, but that there was no evidence taken on oath, and that everybody said what he pleased; that Mr. Tomkins, since the 1st November, 1850, is the Pastor of the Church, and that he is not engaged for any particular time, but that he is to get £125 per annum, to be raised by subscriptions, but that he looks to the Deacons for his salary." He, W. H. Freeman, "took the resolution prepared by Mr. Gallaway, out of his pocket and read it, but no notice was taken of it, except that some person asked me if Mr. Gallaway wrote it." As regards the disposal of the annual produce of the trust fund since 1847, Fady Phillips, one of the Defendants, and their Treasurer, says, "I did not pay Mr. Murkland (who had become the Pastor of the opponents of the Complainant after the meeting house was closed against Complainant) the money he received out of the trust funds on my own responsibility. I had security for it from Freeman Tupper, James Park, and Mr. Murkland. They signed a note for it. The second year, I think, that Freeman Tupper was obligated for fifteen pounds of it, and myself, Henry Payzant, and Samuel Crowell, all trustees, become responsible for ten pounds."

Neither the Rev. Mr. Sterling, Gallaway, Murkland, nor Tomkins, have been examined. The latter took down the testimony or statement of what he, Tupper, would prove, and also, of two other witnesses; also, that of George McLeod, who has not been examined.

All the Defendants belong to Mr. Tomkins' congregation, and are opponents of the Complainant. As regards the discipline and government of the Church, the Rev. Mr. Heudeboureck, who came to this Province in May, 1848, states that the Complainant "was not recognised as a member of the

Congregational Union of Nova Scotia and New Brunswick, in July, 1848;" that "according to the rules of Congregational Churches, any portion of the members may secede from the main body, and set up another Society; that this is evinced by the election of distinct officers, and meeting in a separate place of worship, but that the recognition of this Society by other Churches, depends on their doctrine and practice; that the Congregational Church in Liverpool is an Independent Church, having its own articles of doctrine and discipline."

No record or other definite proof of the articles of doctrine and discipline, nor any record of the rules and regulations of this Church, has been given. One of the Defendants' witnesses, John McLeod, Senr., who has been a member of it for fifteen years, is almost the only witness who speaks of its usages and discipline. As to the term of office of the Minister, on his direct examination, he says, "the Ministers of the Congregational Church of Liverpool are hired annually; that there is no particular time of the year set apart for hiring a Minister; that the contract *must be renewed every year*, if not so renewed there is no subscription list, and of course he gets no pay. The congregation and church make every year distinct voluntary subscriptions for the Minister." On his cross-examination, however, he says, I cannot say the Complainant was hired annually by the Church, I never knew of a written or a verbal contract with him, for any number of years, or for any particular time. What I mean to say is, that the church and congregation *subscribe annually* what they think proper.

In reference to councils and the council meeting, this witness says, "the power of settling all differences in the Church exists in the Church. Every Congregational Church is an independent Church. They have the right to call in the advice of a council of sister Churches, but that council is not to impose their judgment against a majority of the church. The church may, if they please, ratify, confirm, or reject, the decision of the council. They may agree to be bound by the decision. The council met, it was a large meeting, it was the largest meeting of the kind I ever saw. The council heard patiently all that could be said for or against; they sat about five hours. Mr. Kinney was chairman of the meeting. I moved a resolution of the following nature, viz., that the

church do abide by the decision of the council; it was seconded and put by Dencon Kinney; it passed, with only three dissenting voices, and these are now opposed to Complainant. The council afterwards brought in their decision; it was in writing; it was read there; I did not hear a word in opposition to it at the meeting." As respects the formation of a new church, by the withdrawal of a portion of an existing church, and appointing officers, he says, "after this viz., (after the decision of the council, and Complainant furnishing witness with draft of testimonials to be copied and signatures obtained, agreeably to the recommendation of the council,) Complainant formed a distinct church at Herring Cove, *in my opinion*, officers were appointed; if there had been no split in the church, the congregation at Herring Cove would have had no need of appointing officers there. *I am of opinion* that the church at Herring Cove is distinct from the church at Liverpool, and has been so from the time that it was called together, and officers appointed over it at that place. I think it was in the summer of 1848, that the Church was organized at Herring Cove."

If the foregoing statement be incorrect, it is not from the want of a most careful and repeated examination of the mass of testimony relevant and irrelevant, with which the parties have overloaded their case. Of the principal facts, however, upon which the judgment of the Court proceeds, and which I will refer to, as I go on, I have no doubt.

It is to be regretted that an issue had not been asked; or that the Complainant had not pursued his remedy at law, in an action for money had and received, which would have been his cheapest, as well as his most speedy and efficient procedure.

Moreover, if the evidence had been taken before a Master Extraordinary, *viva voce* publicly, (as it might have been) upon written interrogatories, by the Counsel who argued the cause, we should have had, instead of thirty-two witnesses, and the record of their testimony extending over two hundred folios, which is now before the Court, the real facts compressed within a reasonable compass, and not one half the number of witnesses would have been examined.

It will have been gathered from what I have already stated, that this is a contest for the annual produce of the £700 devised by the testator; and that the parties to it are

virtually the Complainant, those who adhere to, and thirdly, those who have withdrawn from him; and that although the character in which the Defendants have been brought before the Court, is that of trustees, as they are all among the Complainant's strongest opponents, they have at least a quasi pecuniary and personal interest in the contest.

Objections to the admissibility of evidence, are not at the present day regarded with favor in any Court; but forty four years ago, an exception very similar to that which Mr. Young has taken, to the reception of Messrs. Tomkins and Gallaway's letters and the certificate of the 16th October, 1847, and quite as strong, was overruled by the Court of King's Bench, in the case of *Beaumont vs. Field*, reported on 1st Barnes & Alderson's reports, page 247.

This case is, however, anomalous: On the record it is between Melvin and the Defendants; yet, as I have just stated, it really is also a contest between the parties who want to turn the Complainant out, and those who want to keep him in office; and therefore, the acts of all and of their agents are admissible in evidence, independently of the rule of this Court, to which I shall presently refer.

Both Mr. Gallaway and Mr. Tomkins have been agents and coadjutors, in these proceedings, and so are those who subscribed that certificate; and Geo. McLeod and W. H. Freeman are among the most active of those agents.

But, as Lord Eldon remarks in 1 Vesey 332, and Lord Hardwicke in *Mason vs. Ward*, 238, "it is not true that because parol evidence is not to be admitted in law, therefore it shall not be admitted in equity." To be sure the latter of those two great judgessays, "by the strict rules of law such evidence would not be admitted, not that I would have it understood as if I laid down that rules of evidence at law and in equity differ in general, but only in particular cases. Where fraud is charged by a bill, or in cases of trust, this Court does not confine itself within such strict rules, as they do at law, but for the sake of justice and equity, will enter into the merits of the case, in order to come at fraud, or to know the true and real intention of a trust. It would very much abridge the power and jurisdiction of this Court, which is chiefly conversant in cases of fraud and trust, if I do not admit such evidence."

Now there is not only a case of *trust*, but

that on which the Defendants chiefly rely, viz., *the resignation of the Complainant, is distinctly charged as having been obtained from him by deceit, that is constructive fraud, which in this Court is equivalent to actual fraud, and may be inferred from circumstances, although at law fraud must be proved.*

The judgment I am pronouncing is important, but the Council on both sides have much overrated its importance, and the consequences that may flow from it. It is important, as it concerns a large sum of money; as it affects the feelings of the congregation who are engaged in an angry contest; and as respects the conduct of some of the principal actors in it. It is, in other respects, an ordinary case, in which the Complainant seeks to enforce upon the Defendants the discharge of the obligations which they undertook, when they accepted their office of trustees. The case depends upon the meaning of the testator, and whether what has occurred has divested the Complainant of that which his devise conferred upon him.

As was appositely remarked by Mr. Young, no decision of mine can restore harmony between the Complainant and the people, or re-unite his severed flock.

No judgment that can be given in this cause can affect the meeting house, the title to it, or its possession. None can affect the rights or the character of dissenters in general, or those of the Congregationalists. They have no status in law. Of the doctrines, government, and discipline, of this Church, this Court knows nothing, except what it finds in the evidence; moreover, whatever these may be now, if the Defendants rely on any infringement of doctrine or discipline, as affecting the Complainant, they must shew that such is an infringement, of "those doctrines, ordinances, and discipline, which the testator contemplated at the time of his death; and of those there is no evidence whatever. In Lady Hewley's case the question was of the greatest importance to all denominations of Christians, for in it the Court removed the trustees of the charity and appointed others, because the trustees applied the trust funds in support of Unitarians; the Court adjudging that her Ladyship's bounty was not intended for those who denied the Divinity of our Saviour.

There abundant testimony was given of the false teaching of those who had received the trust funds, but here there is not a tittle of evidence to shew that the Complainant ever taught Universalist doctrines.

This case is singularly deficient in what ought to have been proved, while it is absurdly redundant in what ought not.

As by the express terms of the devise, Pastor was to be displaced (not by a majority of the church members only, and the testator himself being a member of the church, must have known the distinction between a church member and a member of the congregation only), but by a majority of church members and of the members of the congregation contributing to the Pastor's support, and attending his public ministrations. One would have thought that one or the other of the parties would have furnished the Court with a list of the members of both, respectively, on the 16th of October, 1847, and the same at the time when the council met in 1848. But none such has been proved. Nor, as I have noticed in my detail of the circumstances, has it been shown how the relation of Complainant and flock was created, how long it is to last, or how it was to be dissolved.

Mr. Young emphatically asked if it was contended on Congregationalist principles, that the Complainant was to be considered the Pastor for life. Yet Mr. Punchard, a book from which the learned Counsel drew largely at the hearing, pp. 191, expressly says, that the theory of Congregationalism is that a Pastor is ordained for life, i.e., to a pastoral charge, although he there, and elsewhere, laments the modern deviations in practice from the theory, and censures with deserved severity, the barbarism of starving Congregational Ministers out, in order, indirectly, to dissolve the pastoral relation. Applying the principles of right reason, however, to the testimony, seeing that the Complainant had, in 1847, been without any contract in the exercise of his ministerial office, many years, and especially having reference to the sacred character of such a relation, I shall certainly not hold upon the evidence in this case that the Complainant is, as Mr. McLeod and Freeman would have the Court to believe, a yearly hireling.

Neither is it proved that a council has anything to do with this church, nor if so, how such a council is to be constituted and what its powers are.

Now Mr. Punchard says, pp. 111, an ex-parte council cannot regularly be called until a mutual council has been refused by one of the parties; and he refers to a case decided in Massachusetts, in which the Minister sued for his salary, and the Court gave it to him on the ground that in case of disagreement

of Pastor and people, a mutual council should be proposed, and on this being refused, he says, an *exparte* council should be called, whose decision would have equal force in dissolving the connection between the contending parties.

But Mr. Heudebourck says, this church is an *Independent Church, having its own rules, doctrines, and discipline.*

Without going more at large into this Mr. Punchard's work, or others on Congregationalism, which I have looked into, it is plain that it is impossible to predicate any rules, upon which a Court of justice can proceed, upon any opinions in those books, or upon such as Jno. McLeod gives, for the usages of the Congregational Churches of different countries and of different portions of the same countries, vary from each other.

In the North of Ireland, for instance, entire unanimity is required; in some parts of New England synods or general councils have much greater power than in other parts; while in England and Wales the church government is different in important particulars from that of Scotland, and other countries. So in some few (Punchard states that he knew of one Church) female church members have a share in church government, in others all power of the people over the Pastor is denied.

In short, although those works will enable us to form some general ideas on the subject, I repeat that they can give a Court of justice no reliable data on which to determine the rights of parties.

Therefore, whether the Complainant be or be not now a member of the Congregational Union of Nova Scotia and New Brunswick, is quite immaterial; and he ceased to be so only in 1848; nor in this connection is Mr. Heudebourck's testimony, regarding the formation of new churches, by the withdrawal of a part of an existing church of any moment. And as to the witness Jno. McLeod's opinion: that the election of a Clerk and Deacons at Herring Cove, *ipso facto*, dissolved the Complainant's connexion with the Liverpool Church, it is plain that the object of that meeting *was not to dissolve, but to continue* that relation, by substituting other officers for those who refused to continue in the performance of their duty.

So far from this being their intention, the Complainant continued to do his ministerial duties, at all the stations, as he had done from the first, except only that he did not

preach (because he was not permitted to preach) in the meeting house at Liverpool.

The impression which the whole of the evidence has made upon my mind, is that at the time of the meetings in October and in February, a majority of the church members and congregation adhered to the Complainant; although, in the view which I take of the case, this is not material; that a large portion of both are supporters of the Complainant, is incontrovertible.

I regret that the Defendants instructed their Counsel to prefer imputations upon the moral character of the Complainant; from which I am sure had he been left to his own discretion, he would have refrained.

As regards these, his alleged laxity in discipline and heterodoxy in doctrine, nothing but the ability with which the learned Counsel dealt with them, prevented them from being offensive alike to the feelings and judgment of the Court.

I do not acquiesce in his suggestion that the Defendants have dealt leniently with the Complainant. If they know him to be guilty of incontinence, to have taught Universalist doctrines, or to have been lax in discipline, it was their duty to have proved these charges. But they could not have believed them, for on the 16th October, 1847, he was furnished with a certificate of character, as a passport to another ministerial charge; yet they have loaded the testimony with all the gossip that could be gathered, to insinuate what they could not prove. It is due to the Complainant's character to say, that there is no proof of a single immoral act committed by him, nor of a single instance of his teaching Universalist doctrines, or circulating Universalist tracts. And as to the idle tales of deficient discipline, what is to be thought of a case, in which, one of the witnesses when called upon to testify to it, makes it a charge against his Minister that he thought "he didn't fix up things quite right."

It may be true (its truth, however, depends on the credit of a witness whose memory seems to be somewhat defective) that in a moment of irritation, the Complainant said if he left Liverpool he would preach Universalist doctrines to their full extent. I do not sit here to palliate rash words, but neither is it my office to bring a man to judgment for what he intends only to do.

As regards the objection, that the Complainant did not take back his wife, in pursuance of the resolution of the meeting of November, 1847, the fact is, as I have stated, against the Defendants. It is satisfactorily established that she was living with him at the time of the council meeting. That

she is not now living with him, may be, and probably is, her own fault; for her brother, Freeman Tupper, says that she told him "she could not live with the Complainant, he used her so." And it is one of the offensive, in the many offensive circumstances in the transactions under review, that she was a pecuniary supporter of the Rev. Mr. Merkland, who first superseded her husband, and is now a pecuniary supporter of the Rev. Mr. Tompkins, the present Minister of her husband's opponents.

I have thus, at greater length than was at all convenient to me, reached the real defence to this suit, and I will state it in the language of the Defendants' Counsel. He contends:

That the Complainant tendered his resignation, which was unanimously accepted, at a meeting legally called. (This refers to the meeting in October, 1847).

That his pastoral connection with the church was dissolved, with the advice of the mutual council, whose functions were recognized by the church and by himself; and,

That the Complainant showed his acquiescence in that decision, by giving up the key, and never once entering the meeting house, by promising to deliver up the books, by preparing his own testimonials, in conformity with the decision, and obtaining signatures thereto, and by his repeated declarations.

Now the Complainant's allegation in the bill is

"That some time in the year 1847 some reports having been spread abroad at Liverpool prejudicial to the moral character of your orator a meeting of the Church and Congregation was duly called and assembled to inquire into the grounds of such reports and after strict enquiry and investigation the Church and Congregation came to an unanimous resolution that such reports were wholly unfounded.

And your orator further states unto your Excellency that some designing persons at Liverpool aforesaid pretending great friendship to your orator induced him under the plea that his usefulness as a minister of the gospel at Liverpool was greatly impaired in consequence of such reports to tender a resignation of his charge to the Church and Congregation and ask his dismissal—which dismissal at a small meeting of the members of the Church assembled by and at the instance of the persons who had been instrumental in obtaining your petitioners' dismissal was accepted and at the same time sundry resolutions highly commendatory of your orator were passed.

And your orator further states unto your Excellency that the said dismissal was obtained from your orator by mis-representation on the part of those who obtained it and your orator gave it under entire mis-apprehension of the wishes of the Church and Congregation."

It will thus be seen that the Complainant charges fraud against the parties who obtained his resignation.

It is fit, therefore, that we examine what in this Court is considered fraud, before we go into an

investigation of the transactions connected with that resignation; for in this Court the actions of men are subjected to a severer test than in a Court of Law. "Collusion," says Lord Hardwicke, in *Grubb vs. Collins*, 3 Atk., "is in this Court equivalent to fraud;" and in *Chesterfield vs. Janson*, 2 Vesey 156, his Lordship says, "fraud may be presumed from the circumstances and condition of parties, and this goes further than the rule of law, which is that fraud must be proved. Fraud may be collected and inferred in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the agreement."

And Mr. Justice Story in Sec. 374 of his work on Equity Jurisprudence explicitly lays down the same doctrine, "It may be generally stated," says he, "whatever at law would be deemed badges of fraud or presumptions of ill faith, are fully acted upon in Courts of Equity. But it is by no means to be deemed a logical conclusion, that, because a transaction could not be reached at law as fraudulent therefore it would be equally safe against the scrutiny of a Court of Equity which requires a scrupulous good faith in transactions which the law might not repudiate. It acts upon conscience, and does not content itself with the narrow views of legal remedial justice." So the same eminent Judge in Sect. 251 says if those in whom a "man places confidence make use of strong persuasions, Courts of Equity will assist the party on the ground of unconscionable advantage;" and again Sect. 272, "the distinct ground of relief is the meditated fraud or imposition by intentional concealment, or misrepresentation." In Sect. 308, "where there is a fiduciary or confidential relation between the parties," and in 384, "where a man designedly or knowingly produces a false impression in another, who is thereby drawn into some act, injurious to his own rights or interest, a Court of Equity will relieve." Under the influence of these just principles then let us first look at the relative position and interests of the parties to the transactions of the months of September and October, 1847. Melvin was entitled under the devise of £30 per annum, and a house to reside in, by the Codicil to a farther sum of £60 per annum and if from ill health he became unable to perform his ministerial duties to a provision for his life of no less than £80 per annum, and an assistant in the Ministerial office. To Melvin, Gallaway stood in the relation of a brother, while the Deacons of his church were bound to him by ties equally obligatory. That in seeking to induce a person having so large a pecuniary interest as the Complainant had to abandon it the most scrupulous good faith was due from them to him, is a position that I need not vindicate, it will find a response in every honest heart. It is sworn by the Defendants' witness, that, at this time, there was a design in a few of the Church members, "to get rid of the Complainant by fair means if they could." To effect this, W. H. Freeman and George McLeod were the principal

and most active agents. Then let us examine what they did, for it is by their deeds that the hidden designs of the crafty are unveiled.

It will be recollected that Clements as well as G. McLeod and W. H. Freeman applied in the first instance to Mr. Gallaway, but that Clements was not made acquainted with the contents of the letter written by Mr. Gallaway, nor apprised that he had also prepared a resolution to be moved for Melvin's dismissal. Wherefore this concealment from Clements? Wherefore did they not make enquiry of Mrs. Melvin *before* the letter and resolution were written. The writer of it darkly alluding to rumors (of which unless his wife apprised him he could know nothing, for she had originated them in his absence) tells the Complainant that neither the writer, the Deacons, nor the church, credit them. Yet he tells him, there is a general perhaps a *unanimous* opinion that his usefulness was done at Liverpool! That there was not a *general* far less a *unanimous* opinion to this effect, is now beyond controversy; and how could any man of education and ordinary feeling make such a statement to an aged brother, without taking some means to ascertain its truth. It was no light matter he was dealing with; he could lose nothing, yet was he advising Melvin at a moment's notice to give up all his subsistence and this too while he professed to believe him entirely innocent. It is no justification of Mr. Gallaway that he relied on those deacons. Before he made that assertion and gave that advice he should himself have made the most minute enquiries, for which there was sufficient time and opportunity for he remained at Liverpool a fortnight; he was at any rate, intruding into a brother's domicile, and yet without affording that brother an opportunity of vindicating himself, without even making a single preliminary enquiry of Mrs. Melvin, he prepared a letter to induce him to resign and a resolution to remove him if he did not act on his advice. But the conduct of the Deacons in calling the meeting equally shows the designs of themselves and Mr. Gallaway.

Why was not public notice of this meeting given on the previous Sunday from the pulpit? Why were not the other stations notified of the intruded meeting? Had not they, the members of the church resident in the circumjacent settlements, as much interest in the removal and retention of the Complainant, as they and those whom they gathered together on the 16th October 1847 had? Then observe the implied threat contained in the last sentence of this letter, "Now," says Mr. Gallaway, this word is underscored, "you could get an *honourable* testimonial." It is plain that in writing this Letter Mr. Gallaway was knowingly doing his best to induce the Complainant to resign. But ought he not in common candor to have told the Complainant (whom he addresses as a "Dear Brother," and concludes by subscribing himself as his affectionately,) that if he did not resign, he had prepared a resolution to turn him out of office.

How was the Complainant to ascertain the opinion of his church? Of whom was he to make

enquiries? He could not but feel that his character had been injured by his wife; the language in which his brother Minister addressed him was that of affection, well calculated to excite his hopes and alarm his fears.

It is not extraordinary that under these circumstances he should write and hand to the seventeen members of his church, there assembled what he did and what they eagerly grasped at as a resignation. It has been urged that the complainant having himself treated this as a meeting of the church duly called, not only in that paper but in his bill it does not lie in his mouth to gain say that now.

No doubt the meeting to enquire into the truth or falsehood of the prevalent reports against the Complainant's moral character was a *legal* meeting, and for that purpose duly called. Such it is stated to be in the bill, but it does not therefore follow that it was a meeting which had power to do what belonged not to them alone to do but to them in conjunction with others. The Complainant addressed not them there assembled only but the Congregational Church of Liverpool, and the very terms used shew that it was not his spontaneous act, but the result of the insidious suggestions of Mr. Gallaway and his Deacons. The haste with which the meeting then usurped the functions of the whole church, and resolved that the Complainant's pastoral relation was dissolved, was most unbecoming. I have no hesitation in adjudging this transaction void on two grounds: first, for the deception practised on the Complainant; and secondly, because they had no right to assume the functions of the whole church. The Defendants themselves appear uncertain which of the two meetings to rely on; they state in their answer, "that the Complainant continued to be the Pastor of the Congregational Church until the month of October, 1847, or, until the month of February, 1848."

Now it is clear that in the estimation of a very competent judge, the Rev Mr. Tompkins, that relation continued to exist on the 5th February, 1848; for on that day addressing the Complainant, he speaks of "the church over which you *preside at present*." But before I go farther into this letter, it will be proper to make a few preliminary observations.

It will not be forgotten that a meeting had been held in November, 1848, at which resolutions annulling what had been done at the October meeting, and recognising the Complainant as Pastor, had passed; and that he continued to preach at the usual places, including the meeting house in Liverpool, from that time to the early part of February. That he did this with the acquiescence of all is plain, for Mr. Tompkins commences his letter of the 5th February, by then addressing as his dear brother, "I will preach for you on Sabbath afternoon and evening if you will take the morning service." The Complainant being thus in full possession of his office, and in the use of the meeting house, Mr. Tompkins appeared in Liverpool on the day before he wrote that letter. *He came uninvited* but not *unaccompanied*, for one of his deacons came also, and the latter says he came accidentally.

Mr. Tompkins is immediately found in communication with William H. Freeman, and suggesting to him that a council should be called, of which before that suggestion Freeman Tupper *knew nothing*; and forthwith Mr. Tompkins prepares the paper dated the 5th February, 1848 (the date of his letter to the Complainant he

it recollected) by which it is recommended that a church meeting should be called on the following Monday, the 7th, to enquire into the best means to secure the present and future prosperity of the church.

Now what brought him and his deacon to Liverpool, at that time. Mr. Tomkins ought to have afforded the fullest information on this point. However, W. H. Freeman, of his own authority and without consulting his co-deacons, immediately sent for the Rev. Mr. Sterling, and he and a deacon of his promptly responded to the call, for they too appeared in Liverpool on the 7th, in time to take a part in the proceedings of the contemplated meeting. No notice was given of the purpose of this meeting, nor were the circumjacent stations invited to join in it. The complainant was sick, and as to his having consented to this Council, as it is designated, Hilton, Tompkins' deacon, although he saw him in the course of the day of the meeting, and thinks he must have known of it, cannot recollect what took place when he saw Complainant. It is preposterous to call this a council in any of the aspects in which Mr. Punchard presents such a body to his readers. Mutual it certainly was not, for the Complainant's consent was not asked, nor does it appear that he knew it was to be formed. *Ex parte* it certainly was, that is, a proceeding got up at the suggestion of one of the parties only. It was got up by Mr. Tomkins. W. H. Freeman and George McLeod, in combination with such members of the church as desired to displace the Complainant (as I have already noticed one of the witnesses testifies as the intention) "by fair means if they could."

I will now return to Mr. Tomkins' letter. In this epistle as in Mr. Gallaway's the burthen of it is to induce the Complainant to resign. He says, "I intreat you to resign." Why, according to the written proposition of the learned counsel for the Defendant, the Complainant had resigned on the 16th October 1847: his resignation had been accepted, and the pastoral relation then dissolved. Mr. Tomkins goes on to tell him "you must ultimately resign or damage your character for ever. Every hour," the writer continues "the matter is becoming worse and worse. Pray do not delay, trust the Lord he will provide for you, and bless you if you depend on him," and he proffers him the best testimonials of the church if he resigns. Now let us pause for a moment, was the Complainant Melvin worthy of these testimonials, in Mr. Tomkins' estimation, if so low could his refusing to resign damage his character for ever?

If he were not, how could Mr. Tomkins proffer such testimonials in language so solemn as he uses? Upon the hypothesis of the Complainant's guilt, his ruin might ensue if he declined the proffered testimonials, but in what a position does that hypothesis place Mr. Tomkins?

But to proceed he says "pray my dear brother, let no pecuniary consideration enter into your mind: in a Christian Minister these ought to be quite secondary." Pecuniary considerations! why what is this controversy about but money? Wherefore does Mr. Tomkins take down the testimony of witnesses, in his own house, if it be not to prevent the Complainant from getting what the testator devised especially — intended especially for James Melvin?

The opponents of the Complainant are in possession of the meeting house, and (though not so numerous as his supporters yet they are more wealthy,) can one would think afford to do without the yearly produce of this devise. Pecuniary considerations! the Defendants have already securing themselves from personal liability paid the trust funds to Mr. Merkland for his services for two years, and if this litigation terminates in the Defendants' favor Mr. Tompkins will probably also be the recipient of them, or at least the party who support him. Again I must make the enquiry, is Melvin an adulterer or a fornicator, if so the law is open to his accusers and they ought to resort to it. Delicacy and forbearance are out of the question now at all events; —

for he has charged them on the records of this the highest court in the land, with deception and collusion.

Turning from this letter to what occurred at the meeting the first thing that strikes one is the proposal that before the council retired the meeting should resolve to abide by what the Council should determine. This course is certainly not that which McLeod's testimony would lead us to believe to be consistent with Congregational usage and principles. A council is called to advise a church in difficulty and when the church has heard the advice it may accept or reject it. Not so on this occasion, the resolution to abide by the decision preceded not only the decision but the deliberations of this council. It is idle to dwell on such a procedure with its antecedents and concomitants as binding upon the complainant. This decision like the other two documents is in Mr. Tomkins' hand writing, and is addressed to the Pastor, Deacons and members of the Congregational Church and proceeds as follows:

"We have carefully taken into our consideration the legality of the meeting of your Church at which the Reverend James Melvin tendered his resignation as pastor and we feel bound to state that in our opinion it was a legal one in all respects." But whether that meeting was a legal one as affecting this devise is a question for this Court. And to not a majority of church members only but a majority of them and of the Congregation contributing to his support and usually attending his ministrations is prescribed by the Testator for the removal of the Complainant. Another document put in evidence by the Defendants remains to be considered. It is the paper in the Complainant's hand-writing without date and signature which I have read, it is therefore not in my power to apply its contents to any particular period. But it is by no means a resignation. On the contrary, he throws himself on the church, effecting to urge that he has many ties to bind him to it and to Liverpool and anxiously asks where he is to find a shelter for himself and his children.

I regard the whole of these proceedings as intended to move the fears and hopes of the Complainant and that Mr. Tomkins' letter to him was especially written with that object. On this account they are in a Court of Equity constructively fraudulent and inoperative, but besides this I adjudge them inoperative upon the devise because those of the Congregation who had an interest in it were not called on to take part in the proceedings.

I have hitherto considered the case as it was mainly presented to me at the bar, and (avoiding the question as to that construction of the devise which would give the Complainant an interest therein, determinable only by his death, or by his own act upon adequate consideration) have assumed that he has no greater interest under it, than a successor chosen agreeably to its terms, *e. g.* after the Complainant's death, could claim. But even in this view the question before the Court is a broader one than that presented by either of the learned Counsel. It really is whether a dissolution of the Complainant's pastoral relation, could legally take place by the act of himself and a portion only of the Church, so as to divest the rights under the devise of that other portion of the church, and of the congregation which had not had the opportunity afforded them of endeavouring to dissuade their Pastor from dissolving his connexion with them. It was not in the power of the Complainant, at his own pleasure, at a moment's notice, to withdraw from them his ministrations. He was receiving the produce of the trust funds annually, to minister to them, and in the trust funds they, as well as he, had an interest. They, as well as he, had rights. What he could not legally do by himself, would not have been rendered legal by the conjunction with him of the seventeen church members in October, 1847, even though the transactions had in other respects been unobjectionable. That in the Defendants' estimation, the contract between Pastor and flock had not terminated until the end of that year, is plain, for they paid him the produce of the trust funds to the 31st day of December, 1847.

If the true construction of the devise be, that the benefit of the church and congregation was the primary object of the testator, and that of the Complainant secondary only; and in consequence that the people at all the stations had an interest therein, that interest can not be divested by proceedings in which they were not allowed to participate, the most important of which the meeting in October 1847, had taken place before they had heard of it.

Most unwillingly did the Complainant ask for his dismissal at that time, and taking his other acts and declarations at the strongest, what do they evince but the workings and fluctuations of a deeply agitated mind, anxious to remain, but unwilling by doing so to injure his church; now feeling his character to be irretrievably injured, and his usefulness at an end, and again willing to hope that he might yet be a useful labourer in the field in which he had long toiled.

But if acts and declarations of the Complainant are to be referred to, as affording inferences of acquiescence, acts of resistance also must be regarded, and what act can be more unequivocal than his retaining possession of the Mission House notwithstanding repeated demands upon him to relinquish it.

The entire absence of sordid motives on his part has very favorably impressed the Court. I have found none such in his conduct. There are few who would so readily have assented to part with such a pecuniary interest as the devise gave him, and expectations so considerable as the Codicil promised.

And shall a Court of Equity be quick to mark every indiscreet word and vagrant thought that escaped his lips, and give them form and substance in such wise as to strip him of the bounty of his friend.

It was contended by Mr. Johnston, that the devise gives him a more permanent interest, than would fall to a successor in the pastoral office appointed agreeably to the devise.

During the argument I entertained and expressed some doubts as to the soundness of this construction of it. I have since subjected the devise in connexion with the codicil to a careful examination, and without expressing a decisive opinion, I wish it to be understood that I do not retain the impression which I intimated at the hearing.

I was asked with much solemnity whether (admitting that it was not the fault but the misfortune of the Complainant;—as a scandal did in fact exist, and as he did live apart from his wife) the members of his church were not morally bound to withdraw themselves and their families from his ministry; and whether if I had been a member of it, I would not have done so. My answer is emphatically *no*—unless I believed him to be a guilty man. To abandon him as a victim to his unnatural slanderer;—a minister of the Gospel, and my own minister too, would in my judgment be as practically inexpedient as it would be essentially unjust.

The Defendants' Counsel has also strongly urged, and their witnesses as well as the Defendants who have given testimony have sworn, that the restoration to, or

the retention of, the Complainant in his pastoral charge will break up and ruin the Congregational Church in Liverpool. This may be so, but I must repeat that I cannot see how such a result can follow, from any decree that can be pronounced in this cause.

I have already noticed that, by their distinctive principles, any number of Congregationalists can, at pleasure, separate from their brethren; and that the Complainant's opponents have so separated themselves from him and their former brethren, and worship by themselves. The Defendants and others, have the meeting house, which is described as so creditable in its architecture, its organ and its other adornments, in possession, and they are the wealthiest and most leading men of that body in Liverpool. But were the result to be that which the Defendants deprecate, expediency has no place here.

Upon the conduct of the principal actors in these transactions, I have made unfavorable comments. I have made them reluctantly, but neither learning nor social position, exempts their possessors from merited censure in a Court of Justice.

Judex damnatur, cum nocens absolvitur.

It has been objected against the Complainant, by Mr. Young, that he possesses scarcely the elements of school-boy learning. But with this the Court has nothing to do: it was a question for the testator, and he has answered it; it is a question for those who remained under his ministry, and they are satisfied.

Far be it from me to suggest that literature is not an essential (in these days perhaps an indispensable) element in the education of a Christian Minister. But in times, now happily gone by, great was the neglect of our national churches towards their children, in these then far distant lands. Had it not been for men (unlettered as Melvin) many a dweller in our solitary places, had gone down to the grave without the Christian's hope. These men—unversed in all save the learning of the gospel—yet able to appreciate and impart its glorious truths; their only classic the bible; encountered perils, and endured privations, in spreading these truths; from which the more gently nurtured sons of classical and biblical literature, might well have shrunk back appalled.

I cannot conclude without expressing my sense of the great ability and eloquence displayed at the hearing. I had oftentimes before listened to Mr. Johnston and Mr. Young with pleasure, but on that occasion they surpassed themselves.

I decree that an account be taken as prayed, and reserve for further directions all further questions, and as to costs with leave to the parties to apply to the Court as they may see occasion.

In deciding this case, I have given consideration and efficacy to all the testimony (including that of the Defendants who were examined,) as well as the documents to the reception of which as evidence, the Complainant's Counsel excepted; it is, therefore, unnecessary for me to pronounce an opinion upon those exceptions.